

**ASSEMBLY BILL**

**No. 572**

**Introduced by Assembly Member Yee**

February 18, 2003

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An act to amend Sections 98.6, 98.7, 6310, and 6312 of, and to repeal and add Section 6311 of, the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 572, as introduced, Yee. Employment.

Under existing law, it is unlawful to discriminate against an employee for filing a complaint as to an unlawful employment practice.

This bill would provide that if an employee is discharged or otherwise discriminated against within 90 days of filing a complaint, there is a rebuttable presumption that the action was retaliatory.

Under existing law, the Labor Commissioner is required to investigate complaints of unlawful employment practices.

This bill would provide standards and establish time limits for the Labor Commissioner's investigation and decision.

Under existing law, if an employer does not comply with an order of the Labor Commissioner, the Labor Commissioner may petition a court for relief.

This bill would allow the complainant to prosecute the matter on behalf of the Labor Commissioner.

Under existing law, if an employee is unlawfully required and refuses to perform unsafe work, the employee is entitled to reinstatement and reimbursement for lost wages.

This bill would also allow the employee to recover a penalty, as well as reasonable attorney's fees and costs.

Under existing law, an employer who refuses to comply with an order of the Labor Commissioner is guilty of a misdemeanor.

This bill would make the misdemeanor punishable by a fine or imprisonment, or both, and would also make it a misdemeanor for an employer to knowingly conceal an unsafe working condition, if an employee causes death or serious injury, thereby imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. It is the intent of the Legislature that employees  
2 in this state have effective and enforceable rights to secure safe and  
3 healthful working conditions, and to this end, be protected against  
4 reprisals for complaints about hazardous conditions and refusals  
5 to work in hazardous conditions. The following enumeration of  
6 rights and remedies shall be available and rigorously enforced.
- 7 SEC. 2. Section 98.6 of the Labor Code is amended to read:  
8 98.6. (a) (1) No person shall discharge an employee or in  
9 any manner discriminate against any employee or applicant for  
10 employment because the employee or applicant engaged in any  
11 conduct delineated in this chapter, including the conduct described  
12 in subdivision (k) of Section 96, and Chapter 5 of Part 3 of Division  
13 2, or because the employee or applicant for employment has filed  
14 a bona fide complaint or claim or instituted or caused to be  
15 instituted any proceeding under or relating to his or her rights,  
16 which are under the jurisdiction of the Labor Commissioner, or has  
17 testified or is about to testify in any ~~such~~ proceeding or because of  
18 the exercise by the employee or applicant for employment on  
19 behalf of himself, herself, or others of any rights afforded him or  
20 her.
- 21 (2) *Except in the circumstances of a normal seasonal layoff or*  
22 *a general reduction in force affecting a majority of employees, if*



*a person discharges an employee or demotes, suspends, or reduces the hours of work or pay of an employee within 90 days after the employee has exercised any of the rights enumerated in this code, there is a rebuttable presumption affecting the burden of proof that the person's action was retaliatory and in violation of this section. The burden of proof under this subdivision shall be preponderance of the evidence.*

(b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 of Part 3 of Division 2, or because the employee has made a bona fide complaint or claim to the division pursuant to this part shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by ~~such~~ acts of the employer. Any employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for such rehiring or promotion by a grievance procedure, arbitration or hearing authorized by law, is guilty of a misdemeanor.

(c) (1) Any applicant for employment who is refused employment, who is not selected for a training program leading to employment, or who in any other manner is discriminated against in the terms and conditions of any offer of employment because the applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 of Part 3 of Division 2, or because the applicant has made a bona fide complaint or claim to the division pursuant to this part shall be entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer.

(2) This subdivision shall not be construed to invalidate any collective bargaining agreement that requires an applicant for a position that is subject to the collective bargaining agreement to sign a contract that protects either or both of the following as specified in paragraphs (A) and (B), nor shall this subdivision be construed to invalidate any employer requirement of an applicant for a position that is not subject to a collective bargaining



1 agreement to sign an employment contract that protects either or  
2 both of the following as specified in paragraphs (A) and (B):

3 (A) An employer against any conduct that is actually in direct  
4 conflict with the essential enterprise-related interests of the  
5 employer and where breach of that contract would actually  
6 constitute a material and substantial disruption of the employer's  
7 operation.

8 (B) A firefighter against any disease that is presumed to arise  
9 in the course and scope of employment, by limiting his or her  
10 consumption of tobacco products on and off the job.

11 (d) The provisions of this section creating new actions or  
12 remedies that are effective on January 1, 2002, to employees or  
13 applicants for employment do not apply to any state or local law  
14 enforcement agency, any religious association or corporation  
15 specified in subdivision (d) of Section 12926 of the Government  
16 Code, except as provided in Section 12926.2 of the Government  
17 Code, or any person described in Section 1070 of the Evidence  
18 Code.

19 *(e) Nothing in this section shall be construed to give the Labor*  
20 *Commissioner concurrent jurisdiction with the Workers'*  
21 *Compensation Appeals Board with regard to discrimination*  
22 *complaints.*

23 SEC. 3. Section 98.7 of the Labor Code is amended to read:

24 98.7. (a) Any person who believes that he or she has been  
25 discharged or otherwise discriminated against in violation of any  
26 law under the jurisdiction of the Labor Commissioner may file a  
27 complaint with the division within six months after the occurrence  
28 of the violation. The six-month period may be extended for good  
29 cause. The complaint shall be investigated by a discrimination  
30 complaint investigator in accordance with this section. The Labor  
31 Commissioner shall establish procedures for the investigation of  
32 discrimination complaints. A summary of the procedures shall be  
33 provided to each complainant and respondent at the time of initial  
34 contact. The Labor Commissioner shall inform complainants  
35 charging a violation of Section 6310 or 6311, at the time of initial  
36 contact, of his or her right to file a separate, concurrent complaint  
37 with the United States Department of Labor within 30 days after  
38 the occurrence of the violation.

39 (b) Each complaint of unlawful discharge or discrimination  
40 shall be assigned to a discrimination complaint investigator who



shall prepare and submit a report to the Labor Commissioner based on an investigation of the complaint. The Labor Commissioner may designate the chief deputy or assistant Labor Commissioner or the chief counsel to receive and review the reports. ~~The investigation shall include, where appropriate, interviews with the complainant, respondent, and any witnesses who may have information concerning the alleged violation, and a review of any documents that may be relevant to the disposition of the complaint.~~

The

*(1) The division shall commence an investigation within 10 days of the date that a complaint is received by the division. The division shall provide written notice of the commencement of the investigation to the complainant and respondent upon commencing the investigation.*

*(A) The written notice of commencement shall inform the complainant and respondent of their rights and responsibilities and of all procedures involved in resolving the complaint.*

*(B) The written notice shall order that the respondent shall, without awaiting a discovery request, provide to the complainant and the division all of the following:*

*(i) The name, and, if known, the address and telephone number of each individual likely to have discoverable information that the respondent may use to support its defenses, unless solely for impeachment, identifying the subject of the information.*

*(ii) A copy, or a description by category and location, of all documents, data compilations, and tangible things that are in the possession, custody, or control of the respondent that the respondent may use to support its defenses, unless solely for impeachment.*

*(iii) The employee's personnel file.*

*(C) If the complaint does not provide enough information to commence an investigation, the division shall so notify the complainant of that fact within 10 days, and shall instruct the complainant regarding what additional specific information is needed to commence the investigation.*

*(2) The division shall issue subpoenas, upon showing of good cause, for additional evidence in any form or to compel testimony from a witness.*

1 (3) *The investigation shall be conducted by an inspector,*  
2 *investigator, or attorney designated by the division, who shall*  
3 *obtain and consider, at a minimum, the following information:*

4 (A) *Written statements and transcripts of oral statements*  
5 *submitted by the complainant in response to questioning by the*  
6 *division, which shall include all the elements of a prima facie case.*

7 (B) *Written statements submitted by the respondent.*

8 (C) *Written statements or transcripts of oral statements*  
9 *submitted by the complainant in response to questioning by the*  
10 *division, which shall include questioning the complainant*  
11 *regarding evidence that might tend to rebut statements offered by*  
12 *the respondent.*

13 (D) *Documents subpoenaed from the respondent or any other*  
14 *relevant source to support or rebut the evidence of the complainant*  
15 *or the respondent.*

16 (E) *Written statements or transcripts of oral statements given*  
17 *by witnesses who have information concerning the alleged*  
18 *violation. The identity of a witness shall remain confidential unless*  
19 *the identification of the witness becomes necessary to proceed*  
20 *with the investigation or to prosecute an action to enforce a*  
21 *determination. The*

22 (4) *The person conducting the investigation shall, within 30*  
23 *days of the date that a complaint for which an investigation was*  
24 *commenced is received by the division, file a written investigation*  
25 *report summarizing the findings of the investigation and all the*  
26 *information obtained pursuant to subparagraphs (1) to (3),*  
27 *inclusive. The investigation report submitted to the Labor*  
28 *Commissioner or designee shall include the statements and*  
29 *documents obtained in the investigation, and the findings of the*  
30 *investigator concerning whether a violation occurred. The*

31 (5) *The Labor Commissioner may hold an investigative*  
32 *hearing whenever the Labor Commissioner determines, after*  
33 *review of the investigation report, that a hearing is necessary to*  
34 *fully establish the facts. In the hearing the investigation report*  
35 *shall be made a part of the record and the complainant and*  
36 *respondent shall have the opportunity to present further evidence.*  
37 ~~*The Labor Commissioner shall issue, serve, and enforce any*~~  
38 ~~*necessary subpoenas. If a hearing is conducted, the complainant*~~  
39 ~~*and the respondent have the right to be present, to present*~~  
40 ~~*evidence, and to present and cross-examine witnesses. The*~~

complainant and the respondent have the right to cross-examine witnesses presented by the division. The division may issue, serve, and enforce subpoenas on behalf of the division, the complainant, or the respondent to compel the attendance of witnesses at the hearing.

(6) The division shall issue a decision including findings of fact and conclusions of law within 50 days of the date that a complaint for which an investigation was commenced is received by the division.

(c) If the Labor Commissioner determines a violation has occurred, he or she shall notify the complainant and respondent of the decision within 10 days of the time the decision is issued and direct the respondent to cease and desist from the violation and take any action deemed necessary to remedy the violation, including, *but not limited to*, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of reasonable attorney's fees associated with any hearing held by the Labor Commissioner in investigating the complaint, ~~and~~ the posting of notices to employees, *and specific penalties set forth in subdivision (b) of Section 6310 for matters charging a violation of Section 6310 or 6311.* ~~If~~

(1) If the respondent does not comply with the order within 10 working days following notification of the Labor Commissioner's determination, the Labor Commissioner shall bring an action promptly ~~in an appropriate court~~ against the respondent *in a court of competent jurisdiction. The Labor Commissioner shall petition the court for appropriate temporary relief or restraining order unless he or she determines good cause exists for not doing so.* ~~If~~

(2) If the Labor Commissioner fails to bring an action in court promptly, the complainant may bring an action against the Labor Commissioner in any appropriate court for a writ of mandate to compel the Labor Commissioner to bring an action in court against the respondent, *or the complainant may prosecute the matter on behalf of the Labor Commissioner.* If the complainant prevails in his or her action for a writ *or in a direct prosecution of the Labor Commissioner's order*, the court shall award the complainant court costs and reasonable attorney's fees, notwithstanding any other law. Regardless of any delay in bringing an action in court, the Labor Commissioner shall not be divested of jurisdiction. In any action, the court may permit the claimant to intervene as a party



1 plaintiff to the action and shall have jurisdiction, for cause shown,  
2 to restrain the violation and to order all appropriate relief.  
3 Appropriate relief includes, but is not limited to, rehiring or  
4 reinstatement of the complainant, reimbursement of lost wages  
5 and interest thereon, *specific penalties set forth in subdivision (b)*  
6 *of Section 6310 for matters charging a violation of Section 6310*  
7 *or 6311*, and any other compensation or equitable relief as is  
8 appropriate under the circumstances of the case. ~~The Labor~~  
9 ~~Commissioner shall petition the court for appropriate temporary~~  
10 ~~relief or restraining order unless he or she determines good cause~~  
11 ~~exists for not doing so.~~

12 (d) (1) If the Labor Commissioner determines no violation has  
13 occurred, he or she shall notify the complainant and respondent *of*  
14 *the decision within 10 days of the time the decision is issued* and  
15 shall dismiss the complaint. ~~The~~

16 (2) ~~The~~ Labor Commissioner may direct the complainant to  
17 pay reasonable attorney's fees associated with any hearing held by  
18 the Labor Commissioner if the Labor Commissioner finds the  
19 complaint was frivolous, unreasonable, groundless, and was  
20 brought in bad faith. ~~The~~

21 (3) ~~The~~ complainant may, after notification of the Labor  
22 Commissioner's determination to dismiss a complaint, bring an  
23 action in an appropriate court, which shall have jurisdiction to  
24 determine whether a violation occurred, and if so, to restrain the  
25 violation and order all appropriate relief to remedy the violation.  
26 Appropriate relief includes, but is not limited to, rehiring or  
27 reinstatement of the complainant, reimbursement of lost wages  
28 and interest thereon, *specific penalties set forth in subdivision (b)*  
29 *of Section 6310 for matters charging a violation of Section 6310*  
30 *or 6311*, and other compensation or equitable relief as is  
31 appropriate under the circumstances of the case. ~~When~~

32 (4) ~~When~~ dismissing a complaint, the Labor Commissioner  
33 shall advise the complainant of his or her right to bring an action  
34 in an appropriate court if he or she disagrees with the  
35 determination of the Labor Commissioner, and in the case of an  
36 alleged violation of Section 6310 or 6311, to file a complaint  
37 against the state program with the United States Department of  
38 Labor.

39 ~~(2)~~



(5) The filing of a timely complaint against the state program with the United States Department of Labor shall stay the Labor Commissioner's dismissal of the division complaint until the United States Secretary of Labor makes a determination regarding the alleged violation. Within 15 days of receipt of that determination, the Labor Commissioner shall notify the parties whether he or she will reopen the complaint filed with the division or whether he or she will reaffirm the dismissal.

(e) The Labor Commissioner shall notify the complainant and respondent of his or her determination under subdivision (c) or paragraph (1) of subdivision (d), not later than 60 days after the filing of the complaint. Determinations by the Labor Commissioner under subdivision (c) or (d) may be appealed by the complainant or respondent to the Director of Industrial Relations within 10 days following notification of the Labor Commissioner's determination. The appeal shall set forth specifically and in full detail the grounds upon which the appealing party considers the Labor Commissioner's determination to be unjust or unlawful, and every issue to be considered by the director. The director may consider any issue relating to the initial determination and may modify, affirm, or reverse the Labor Commissioner's determination. The director's determination shall be the determination of the Labor Commissioner. The director shall notify the complainant and respondent of his or her determination within 10 days of receipt of the appeal.

(f) The rights and remedies provided by this section do not preclude an employee from pursuing any other rights and remedies under any other law.

SEC. 4. Section 6310 of the Labor Code is amended to read:

6310. (a) ~~No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following:~~ *It is an unlawful employment practice for an employer to subject an employee to an adverse employment action because any of the following has occurred:*

(1) ~~Made~~ *The employee filed, caused to be filed, or made known his or her intention to file, any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer or any agent of his or her employer, or his or her representative.*

1 (2) ~~Instituted~~ *The employee instituted* or caused to be instituted  
2 any proceeding under or relating to his or her rights or has testified  
3 or is about to testify in the proceeding or because of the exercise  
4 by the employee on behalf of himself, herself, or others of any  
5 rights afforded him or her *pursuant to Division 5 (commencing*  
6 *with Section 6300).*

7 (3) ~~Participated~~ *The employee participated* in an occupational  
8 health and safety committee ~~established pursuant to Section~~  
9 ~~6401.7.~~

10 (b) ~~Any employee who is discharged, threatened with~~  
11 ~~discharge, demoted, suspended, or in any other manner~~  
12 ~~discriminated against in the terms and conditions of employment~~  
13 ~~by his or her employer because the employee has made a bona fide~~  
14 ~~oral or written complaint to the division, other governmental~~  
15 ~~agencies having statutory responsibility for or assisting the~~  
16 ~~division with reference to employee safety or health, his or her~~  
17 ~~employer, or his or her representative, of unsafe working~~  
18 ~~conditions, or work practices, in his or her employment or place~~  
19 ~~of employment, or has participated in an employer-employee~~  
20 ~~occupational health and safety committee, shall be entitled to~~  
21 ~~reinstatement and reimbursement for lost wages and work benefits~~  
22 ~~caused by the acts of the employer. Any employer who willfully~~  
23 ~~refuses to rehire, promote, or otherwise restore an employee or~~  
24 ~~former employee who has been determined to be eligible for~~  
25 ~~rehiring or promotion by a grievance procedure, arbitration, or~~  
26 ~~hearing authorized by law, is guilty of a misdemeanor.~~

27 (4) *The employee refused to perform unsafe work, as defined in*  
28 *subdivision (d).*

29 (b) *An employer who violates subdivision (a) is liable for the*  
30 *following:*

31 (1) *Twenty-five thousand dollars (\$25,000) or three times the*  
32 *value of the employee's lost benefits and wages, whichever is*  
33 *greater.*

34 (2) *Other pecuniary losses caused by the violation of*  
35 *subdivision (a).*

36 (3) *Reinstatement.*

37 (4) *Reasonable attorney's fees and costs.*

38 (c) *For purposes of this section, "adverse employment action"*  
39 *means a discharge, demotion, or suspension of an employee, or an*  
40 *action that threatens to discharge or in any other manner*

1 *discriminates against an employee in a term or condition of*  
2 *employment.*

3 (d) *For purposes of this section, “refused to perform unsafe*  
4 *work” means a refusal to perform work under all of the following*  
5 *conditions:*

6 (1) *The employee complained in good faith about working*  
7 *conditions or practices which he or she reasonably believed to be*  
8 *unsafe or dangerous, created a real and apparent hazard, or was*  
9 *likely to cause death or serious physical harm to the employee, his*  
10 *or her fellow employees, or the employees of another employer.*

11 (2) *As soon as practicable, and immediately upon request, the*  
12 *employee reported his or her refusal and reasons to his or her*  
13 *immediate supervisor, foreperson, or any person in authority.*

14 (3) *The employee performed alternative work if requested by*  
15 *the employer.*

16 SEC. 5. Section 6311 of the Labor Code is repealed.

17 ~~6311. No employee shall be laid off or discharged for refusing~~  
18 ~~to perform work in the performance of which this code, including~~  
19 ~~Section 6400, any occupational safety or health standard or any~~  
20 ~~safety order of the division or standards board will be violated,~~  
21 ~~where the violation would create a real and apparent hazard to the~~  
22 ~~employee or his or her fellow employees. Any employee who is~~  
23 ~~laid off or discharged in violation of this section or is otherwise not~~  
24 ~~paid because he or she refused to perform work in the performance~~  
25 ~~of which this code, any occupational safety or health standard or~~  
26 ~~any safety order of the division or standards board will be violated~~  
27 ~~and where the violation would create a real and apparent hazard to~~  
28 ~~the employee or his or her fellow employees shall have a right of~~  
29 ~~action for wages for the time the employee is without work as a~~  
30 ~~result of the layoff or discharge.~~

31 SEC. 6. Section 6311 is added to the Labor Code, to read:

32 6311. (a) An employer is guilty of a misdemeanor punishable  
33 by imprisonment in the county jail for a period not to exceed one  
34 year, or by a fine not to exceed one hundred thousand dollars  
35 (\$100,000), or both, but if the employer is a corporation or limited  
36 liability company, the fine may not exceed one million five  
37 hundred thousand dollars (\$1,500,000) if all of the following have  
38 occurred:

(1) An employer or an agent of the employer knew, through personal observation or by virtue of the fact, by means of either of the following:

(A) An employee refused to perform unsafe work.

(B) An employee, or his or her labor, legal, or medical representative, reported an unsafe working condition to the employer or an agent of the employer who has management control of the workplace.

(2) The employer concealed the unsafe working condition.

(3) The unsafe working condition was likely to cause death or serious physical harm.

(4) The unsafe working condition did cause death or serious physical harm to an employee.

(b) Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor punishable by imprisonment in the county jail for a period of not exceeding six months or by a fine not to exceed fifty thousand dollars (\$50,000), or both. If the employer is a corporation or limited liability company, the fine is not to exceed two hundred fifty thousand dollars (\$250,000).

(c) In determining the amount of the fine to impose under this section, the court shall consider all relevant circumstances, including, but not limited to, the nature, circumstances, extent, and gravity of the violation, any prior history of violations by the employer, the ability of the employer to pay, and any other matter the court determines the interests of justice requires.

SEC. 7. Section 6312 of the Labor Code is amended to read:

6312. (a) Any employee who believes that he or she has been ~~discharged or otherwise discriminated against~~ *subjected to an adverse employment action* by any person in violation of Section 6310 or 6311 may file a complaint with the Labor Commissioner pursuant to Section 98.7 *or may pursue a civil action in a court of competent jurisdiction.*

(b) *In order to more effectively protect employees' rights to secure, safe, and healthful working conditions, and to assure effective and enforceable rights in the event of reprisal for involvement with occupational health and safety issues, there shall be established within the Division of Labor Standards*

1 *Enforcement a unit or personnel designated solely to handle*  
2 *matters pursuant to Sections 6310 to 6312, inclusive.*

3 *(c) The division shall file an annual report with the Legislature*  
4 *by December 1 of each year. This report shall provide an*  
5 *accounting of all matters involving Sections 6310 to 6312,*  
6 *inclusive, and shall report statistics so as to coincide with the*  
7 *Federal Occupational Safety and Health Administration fiscal*  
8 *year. The report shall include, but is not limited to, information*  
9 *regarding cases filed, investigated, dismissed, settled, heard, or*  
10 *appealed, the caseload of the division, the timeliness of*  
11 *dispositions, and other information the Legislature may request in*  
12 *advance of the report. The Legislature shall direct the division as*  
13 *to any additional items to include in the report by October 1 of the*  
14 *year the report is due. The Legislature may hold a hearing on the*  
15 *report and obtain additional information after the report is*  
16 *submitted.*

17 SEC. 8. No reimbursement is required by this act pursuant to  
18 Section 6 of Article XIII B of the California Constitution because  
19 the only costs that may be incurred by a local agency or school  
20 district will be incurred because this act creates a new crime or  
21 infraction, eliminates a crime or infraction, or changes the penalty  
22 for a crime or infraction, within the meaning of Section 17556 of  
23 the Government Code, or changes the definition of a crime within  
24 the meaning of Section 6 of Article XIII B of the California  
25 Constitution.

